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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and
SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN AND ROSA GEORGE,
Real Parties in Interest)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Hague Evidence Convention* applicable to the discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction?

2. Where the Hague Evidence Convention applies, may a court disregard its procedures without any particularized analysis of comity considerations?

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* Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974).

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

CASES

TABLE OF AUTHORITIES CITED

Statutes and Treaties

Other Authorities

TABLE OF AUTHORITIES CITED

OTHER AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit[1] This case raises substantially similar issues to *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98) and *In re Messerschmitt Bolkow Blohm, GmbH*, 757 F.2d 729

[1] In response to Rule 28.1, Petitioners state the following: Petitioner Societe de Construction d'Avions de Tourism is a wholly-owned subsidiary of Petitioner Societe Nationale Industrielle Aerospatiale. Petitioners have no other affiliates or subsidiaries which are not wholly-owned.

In addition to the parties shown in the caption, Seed & Grain Construction Co. is a party in the district court proceedings. It did not participate in the writ proceedings before the Eighth Circuit.

(5th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-99). Should the Court grant certiorari in either or both of those cases, it is requested that this petition be granted and the cases consolidated or, alternatively, that action on this petition be held in abeyance pending the Court's final disposition of *Anschuetz* and *Messerschmitt.*

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 782 F.2d 120; the order of the magistrate (Appendix B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1986. No petition for rehearing was filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case concerns the construction and purpose of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and France on October 6, 1974) ("Hague Evidence Convention") and the interplay between the Hague Evidence Convention, the Federal Rules of Civil Procedure, and French Penal Code Law No. 80-538. The Hague Evidence Convention is reproduced as Appendix C. Rules 33, 34 and 36 of the Federal Rules of Civil Procedure are reproduced as Appendix D. French Penal Code Law No. 80-538 ("French Blocking Statute") and an official translation thereof are reproduced as Appendix E.

STATEMENT

The facts of this case present a frequently recurring pattern in U.S. courts: a foreign company is sued, and counsel for plaintiff, unfamiliar with the procedures of the Hague Evidence Convention or unwilling to employ them, seeks documents and information located abroad through domestically applicable discovery procedures. In response, the defendant moves for a protective order to require plaintiff's compliance with the terms of the treaty.

The Hague Evidence Convention provides various methods for litigants in civil and commercial disputes to obtain evidence from abroad. It is intended to help bridge the significant procedural obstacles encountered when litigants seek evidence located in a foreign country having a legal system different from our own and, in particular, to bridge the differences between the common law and civil law approaches.[2] The Convention is based on the principal that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." S. Exec. A, 92d Cong., 2d Sess. 11 (1972).

The letter of request procedure established by article 1 of the Convention is the method ordinarily available to litigants seeking foreign discovery. The signators to the Convention, including the United States and France, have agreed that letters of request "shall be executed expeditiously" (Art. 9, App. C at 29a), applying "appropriate measures of compulsion" (Art. 10, App. C at 29a) subject to certain limited exceptions.

Petitioners in the present case are corporations formed under the laws of the Republic of France. Petitioners maintain no corporate offices, manufacturing plants or service facilities in the United States. Hence, all of petitioners' documents and business records are located in France and thus are subject to the French Blocking Statute. This statute prohibits the disclosure of "economic, commercial, industrial, financial or technical documents or information leading to the constitution of evidence [establishment of proof] with a view to foreign judicial or administrative proceedings or in connection therewith" unless such disclosure is made in accordance with international agreements binding on

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[2] See S. Exec. A, 92d Cong., 2d Sess. VI (1972); S. Exec. Rep. No. 25, 92d Cong., 2d Sess. 1 (1972); Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 806 (1969).

France. App. E at 47a. As a consequence, petitioners, their officers and employees face criminal exposure should they cooperate in discovery, such as that ordered by the courts below, which disregards the procedures of the Hague Evidence Convention.

The claims in this case arise from a plane crash near New Virginia, Iowa, on August 19, 1980. In two actions consolidated in the United States District Court for the Southern District of Iowa, plaintiffs allege that the plane manufactured by petitioners was defective and seek damages for personal injuries on a products liability theory.

In April and June 1985, plaintiffs served on petitioners several requests for admissions, a request for production of documents, and a set of interrogatories. In response to plaintiffs' discovery requests, petitioners sought a protective order to require that discovery be conducted in accordance with the provisions of the Hague Evidence Convention. They informed the court that, to the extent they had documents or information responsive to these requests, they are located in France and that their disclosure is prohibited by French law except in accordance with the Convention. The motion for a protective order was denied. The magistrate explained that his decision was based on "concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts." App. B at 24a. He also speculated that the French Blocking Statute is not strictly enforced in France. App. B at 23a-24a.

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism petitioned the court of appeals for a writ of mandamus to review the magistrate's order. Because of the novel and important questions presented, the court of appeals agreed to consider the petition on the merits. 782 F.2d at 123; App. A at 3a. Relying heavily on *Anschuetz* and *Messerschmitt*, the court held that the Hague Evidence Convention does not apply to the discovery requests here in question. It stated:

> Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. [782 F.2d at 124; App. A at 4a.][3]

Recognizing that this rule would severely restrict the Convention's scope, the court observed that "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers." 782 F.2d at 125; App. A at 6a.

The court then turned its attention to the French Blocking Statute which, in light of its earlier ruling that the Convention does not apply, the court treated as an independent ground for petitioners' objections to compliance with discovery orders. On the basis of *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), and its progeny, the court found that considerations of comity do not require any deference to the French Blocking Statute. 782 F.2d at 126-27; App. A at 8a-10a. Accordingly, it ordered that discovery proceed. 782 F.2d at 127; App. A at 10a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve an important issue upon which the decisions of the lower courts are divided. This issue is whether the Hague Evidence Convention, a multilateral treaty to which the United States is a signatory, is applicable to discovery of documentary evidence and information located abroad from a foreign national over whom a U.S. court has personal jurisdiction. The decision below, following Fifth Circuit precedent, held that it is not and, consequently, disregarded the Convention's procedures for gathering evidence abroad without properly weighing comity considerations. The practical consequence of this decision, if left

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[3] The rule stated by the Eighth Circuit has hardly been adopted by the "vast majority of courts" in the available written opinions. *See* notes 22-24, *infra* and accompanying text.

to stand unreviewed, will be to place most discovery aimed at foreign nationals outside the scope of the Convention and to foster international conflict over evidence gathering in U.S. proceedings.

I

THE APPLICABILITY OF THE HAGUE EVIDENCE CONVENTION'S PROCEDURES TO AMERICAN DISCOVERY IS A QUESTION OF UNDENIABLE IMPORTANCE

A basic purpose of the Hague Evidence Convention is "to improve mutual judicial cooperation in civil or commercial matters." Preamble, App. C at 26a. Although the Parties' representatives have unanimously agreed that the Convention's use should be encouraged to help avoid conflicts arising from the application of blocking statutes,[4] the practical consequence of the decision below, and the line of cases which it represents, is to relegate the Convention to disuse in all but the most unusual circumstances.

The importance of the questions presented by this petition has been much attested. The governments of France, Germany and the United Kingdom have each urged the Court to consider them.[5] In particular, the French authorities have communicated to the State Department their strong wish that the Court examine the issues concerning the interpretation and application of the Hague Evidence Convention raised in *Anschuetz* and *Mes-*

[4] *See* Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 24 Int'l Legal Materials 1668, 1679 (1985).

[5] *See* Supplementary Brief in Response to the Solicitor General's Brief for the United States at 1a-4a (diplomatic notes from Federal Republic of Germany), 5a-10a (diplomatic note from France), Anschuetz & Co. GmbH v. Mississippi River Bridge Authority and Messerschmitt Bolkow Blohm, GmbH v. Walker, Docket Nos. 85-98 and 85-99; Reply Brief of Petitioner, *Anschuetz* at 1a-2a (diplomatic note from France) 3a-4a (diplomatic note from United Kingdom); Brief for the Federal Republic of Germany as Amicus Curiae, *Anschuetz*.

For the Court's convenience, the most recent diplomatic note from France is reprinted as Appendix F to this petition.

serschmitt and now by this petition. Contrary to the decision below, the French authorities hold that the Convention is the "obligatory channel"[6] and "only legal means of obtaining evidence in civil or commercial matters for the requirements of a [foreign] judicial procedure."[7]

The government of the United States has also attested to the importance of the questions here presented, both explicitly and through its actions. The Court may recall that it has invited the Solicitor General on three prior occasions to express the views of the United States on petitions raising substantially similar issues.[8] In each instance, the Solicitor General has acknowledged the importance of the broad question[9] but found a ground for suggesting that the particular case at hand need not be heard. The fluctuation in the views of the Executive Branch expressed in these cases and its inability to articulate any workable rules concerning the applicability of the Hague Evidence Convention's procedures to American discovery disputes underscore the need for a ruling from this Court.

In the first case, *Volkswagenwerk A.G. v. Falzon,* 465 U.S. 1014 (1984) *(appeal dismissed),* a Michigan trial court had ordered the defendant, a German corporation, to make its employees available for depositions before U.S. consular officials in Germany. The Solicitor General informed the Court that the Hague Evidence Convention "deals comprehensively with the methods available to United States courts and litigants to obtain

[6] App. F at 57a.

[7] App. F at 55a.

[8] Volkswagenwerk A.G. v. Falzon, 464 U.S. 811 (1983), *appeal dismissed,* 465 U.S. 1014 (1984); Club Mediterranee S.A. v. Dorin, 465 U.S. 1019, *appeal dismissed and cert. denied,* 105 S. Ct. 286 (1984); *Anschuetz* and *Messerschmitt,* Docket Nos. 85-98 and 85-99, 106 S. Ct. 52 (1985).

[9] Brief for the United States as Amicus Curiae at 3, Volkswagenwerk A.G. v. Falzon; Brief for United States as Amicus Curiae at 3, Club Mediterranee S.A. v. Dorin; Brief for United States as Amicus Curiae at 6, *Anschuetz* and *Messerschmitt.*

proceedings abroad for taking evidence"[10] and that "parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted."[11] Accordingly, the Solicitor General advised the Court that the noticed depositions were barred by the Convention.[12] Nonetheless, the Solicitor General argued that review was unnecessary because the U.S. government had ordered its consular officials not to cooperate with plaintiff's counsel, making execution of the Michigan court's order impossible.[13]

In the second case, *Club Mediterranee, S.A. v. Dorin,* 105 S. Ct. 286 (1984) *(appeal dismissed and cert. denied)*, a New York state court had ordered a French defendant to answer interrogatories. The defendant had represented to the court that this would require information located in France and that the French Blocking State prohibited this information's disclosure except through the procedures of the Hague Evidence Convention.[14] Again, the Solicitor General urged that review be denied, but in doing so significantly revised the position it had presented to the Court in *Falzon*. The Solicitor General, apparently having reconsidered the statements it had made in *Falzon* concerning the intent of the

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[10] Brief for the United States as Amicus Curiae at 5, Volkswagenwerk A.G. v. Falzon.

[11] *Id.* at 6. The Solicitor General explicitly rejected the rule, adopted by the Eighth Circuit here, that the Convention has no applicability where the court has jurisdiction over the foreign person against whom discovery is sought:

> The fact that a state court has personal jurisdiction over a private party . . . does not mean that treaty limits on proceedings for the taking of evidence abroad somehow do not apply to discovery orders addressed to such parties. The Evidence Convention protects the judicial sovereignty of the country in which evidence is taken, not the interests of the parties to the suit. Accordingly, its strictures apply regardless of the existence of personal jurisdiction. [*Id.* at 7 n.3.]

[12] *Id.* at 7.

[13] *Id.* at 11.

[14] Brief for United States as Amicus Curiae at 2, Club Mediterranee S.A. v. Dorin.

parties to the Hague Evidence Convention, advised the Court that the Convention does not specify the exclusive means for litigants in U.S. courts to obtain discovery of evidence located in a foreign country that is a party to the Convention.[15] The Solicitor General urged that American courts retain the power to demand the production of evidence from foreign nationals subject to the court's personal jurisdiction, but that the use of such power must be tempered by principles of international comity. American courts should utilize the procedures of the Hague Evidence Convention in appropriate cases to avoid unnecessary international friction.[16] Certiorari should be denied, the Solicitor General urged in *Club Med,* because the courts below had not made express findings sufficient for an adequate review of comity considerations.[17]

Most recently, the Court requested that the Solicitor General express the views of the Executive Branch on the scope and applicability of the Hague Evidence Convention in the two cases still pending before the Court, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority,* No. 85-98 and *Messerschmitt Bolkow Blohm, GmbH v. Walker,* No. 85-99. The Solicitor General required six months of deliberations to inform the Court that its views had not changed since *Club Med* and that, notwithstanding "some troublesome language", the court of appeals' decisions "are essentially correct."[18]

The Solicitor General found *Anschuetz* and *Messerschmitt* to be "essentially correct" by employing a case-by-case comity approach. This analysis is difficult to glean from the *Anschuetz* and *Messerschmitt* decisions themselves and, even were it to be adopted by this Court, would not provide any meaningful guidance to the lower courts. A more straightforward reading of the Fifth Circuit's decisions is that the Fifth Circuit was aware of the

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[15] *Id.* at 3.

[16] *Id.* at 3, 13.

[17] *Id.* at 3-4, 13-14.

[18] Brief of United States as Amicus Curiae at 6, 8, *Anschuetz* and *Messerschmitt.*

lower courts' need for guidance on the interplay between the Hague Evidence Convention and the Federal Rules[19] and was providing them a clear-cut rule to follow—i.e., that the Convention "has no application at all to the production of evidence in this country"[20] by a person over whom the court has jurisdiction, "even where the preparatory acts occur in foreign nations."[21] The Solicitor General's inability to embrace this proposition and failure to articulate any workable alternative standards are themselves important reasons why the Court should address the questions presented here.

The decision below recognized the novelty and the importance of these questions in granting mandamus review. 782 F.2d at 123; App. A at 3a. Because questions concerning the Convention's application usually arise in discovery disputes which rarely survive trial, appellate review of such questions is normally by writ of mandamus which is by its nature extraordinary and difficult to obtain. *See, e.g., Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of question on interplay between Hague Evidence Convention and Federal Rules of Civil Procedure). The practical consequences of denying review in both this case and in *Anschuetz* may well be to foreclose further opportunity for the Court to address these questions in the context of a fully reasoned opinion on the merits by a U.S. circuit court. Thus, notwithstanding the Solicitor General's reservations about the rule stated in *Anschuetz* and followed by the decision below, this rule will become effectively the law of the land unless certiorari is granted.

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[19] *See Anschuetz*, 754 F.2d at 605-606.

[20] *Id.*at 615.

[21] *Id.* at 611.

II

THERE IS A SHARP DIVISION AMONG THE LOWER COURTS ON THE INTERPLAY BETWEEN THE HAGUE EVIDENCE CONVENTION AND THE FEDERAL RULES

There is considerable confusion among the lower federal and state courts on when the Hague Evidence Convention applies to discovery of documents and information located abroad from a foreign litigant, and whether, assuming it applies, a court may disregard its procedures. Broadly speaking, there are two major competing viewpoints. First, the decision below and the line of cases which it represents hold that the Convention is not applicable when the court has jurisdiction over a foreign litigant "even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention."[22] Second, other courts, including the West Virginia Supreme Court, have concluded that the Convention does apply to such discovery requests and that considerations of comity require that its procedures be employed at least in the first instance.[23] Other points of view are expressed in the case law as well. For

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[22] 782 F.2d at 124, App. A at 4a. *See Anschuetz* 754 F.2d at 611, *Messerchmitt*, 757 F.2d at 731; Lowrance v. Michael Weinig, Gmbh & Co., 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); Wilson v. Lufthansa German Airlines, 108 A.D. 2d 393, 489 N.Y.S. 2d 575, 577 (1985); International Society for Krishna Consciousness, Inc. v. Lee, 105 F.R.D. 435, 444 (S.D.N.Y. 1984); Adidas (Canada) Ltd. v. SS Seatrain Bennington, Nos. 80 Civ. 1911, 82 Civ. 0375, slip op. (S.D.N.Y. 1984); Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503, 520-24 (N.D. Ill, 1984).

[23] Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher, 328 S.E.2d 492, 504-06 (W. Va. 1985); Th. Goldschmidt A.G. v. Smith, 676 S.W.2d 443, 445 (Tex. Ct. App. 1984); Vincent v. Ateliers de la Motobecane, S.A., 193 N.J. Super. 716, 475 A.2d 686, 690 (1984); General Electric Co. v. North Star Int'l, Inc., No. 83 C 0838 (N.D. Ill. 1984) (memorandum opinion and order); Philadelphia Gear Corp. v. American Pfauter Corp., 100 F.R.D. 58, 60 (E.D. Pa. 1983); Schroeder v. Lufthansa German Airlines, 18 Av. Cas. (CCH) 17,222, 17,223-24 (N.D. Ill. 1983); Pierburg GmbH & Co. KG v. Superior Court, 137 Cal. App. 3d 238, 243-44, 186 Cal. Rptr. 876 (1982); Volkswagenwerk

example, certain trial courts have ruled that the Hague Evidence Convention is the exclusive means for obtaining evidence abroad.[24]

In *Anschuetz,* the Solicitor General has told the Court that "the differences between the West Virginia Supreme Court and the Fifth Circuit are relatively modest and do not create a meaningful conflict requiring this Court's review."[25] Whatever the merits of the reasoning underlying this somewhat surprising conclusion, however, it does not eliminate the conflict created by the decision below. According to the Solicitor General's interpretation of *Anschuetz* and *Starcher,* both courts engaged in a comity analysis of whether to follow the Convention's procedures and reached different results on the basis of factual differences

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[24] *See, e.g.,* Cuisinarts, Inc. v. Robot Coupe, S.A., No. CV 80 0050083 (Conn. Super. Ct. 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention); *see also* Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad,* 132 U. Pa. L. Rev. 1461 (1984).

Some lower court decisions might be characterized as representing a fourth point of view: that the Convention applies to all discovery against foreign persons, but rarely, if ever, does comity require its procedures to be employed where the court has jurisdiction over the foreign person. *See, e.g.,* Work v. Bier, 106 F.R.D. 45 (D.D.C. 1985); Slauenwhite v. Bekum Maschinenfabriken GmbH, 104 F.R.D. 616, 618-19 (D. Mass. 1985); Graco v. Kremlin, Inc., 101 F.R.D. at 520-24; Lasky v. Continental Products Corp., 569 F. Supp. 1227, 1229 (E.D. Pa. 1983); International Society for Krishna Consciousness v. Lee, 105 F.R.D. at 443-44. This viewpoint confounds in personam jurisdiction with the power to compel discovery. *See* Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 741-44 (1983).

[25] Brief of the United States as Amicus Curiae at 19, *Anschuetz* and *Messerschmitt.*

which "the Court is not well postured to address."[26] Here, the decision below makes no pretext of weighing comity considerations. It states clearly that it is adopting the "rule" of *Anschuetz* that, where there is in personam jurisidiction over a foreign litigant, the Hague Evidence Convention has no applicability. 782 F.2d at 124; App. A at 4a. Thus, if, as the Solicitor General has claimed, the prior decisions "do not create a meaningful conflict," their juxtaposition with the decision below clearly does.

III

THE FAILURE OF THE DECISION BELOW TO INTERPRET AND ADMINISTER THE HAGUE EVIDENCE CONVENTION ACCORDING TO ITS TERMS WILL FOSTER INTERNATIONAL CONFLICT OVER EVIDENCE GATHERING IN U.S. PROCEEDINGS

In addition to the importance of the questions presented and the sharp division among the lower courts on these questions, the Eighth Circuit's decision is contrary to basic canons of treaty construction and fails to adhere to the principles of international comity discussed in the better reasoned cases[27] and much stressed in the views of the Solicitor General. The language and negotiating history of the Hague Evidence Convention make clear that it applies to discovery requests such as those here in issue. In order to avoid a conflict between the Federal Rules of Civil Procedure and the French Blocking Statute, principles of comity require in the present case that resort be made to the Hague Evidence Convention, at least in the first instance. The decision below interprets the treaty in contravention of the Parties' intent and

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[26] *Id.*

[27] *See, e.g.,* Gebr. Eickhoff Maschinenfabrik und Eisengieberei v. Starcher, 328 S.E.2d at 501-06; Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 105 F.R.D. 16, 28-36 (S.D.N.Y. 1984); Vincent v. Ateliers de La Motobecane, S.A., 475 A.2d at 690-91; Volkswagenwerk A.G. v. Superior Court, 123 Cal. App. 3d at 857-59.

fosters conflicts which they have agreed the Convention should be used to avoid.[28]

A. The Hague Evidence Convention by Its Terms Applies to the Discovery Requests In Issue Here

The duty of the courts is "to interpret [a treaty] and administer it according to its terms." *Doe ex dem. Clark v. Braden,* 57 U.S. (16 How.) 635, 657 (1854). This task begins "with the text of the treaty and the context in which the written words are used." *Air France v. Saks,* 105 S. Ct. 1338, 1341 (1985).

Nowhere in the Hague Evidence Convention is a distinction drawn between parties and non-parties, and such an interpretation undermines its structure. In *Volkswagenwerk A.G. v. Falzon,* the Solicitor General explicitly rejected such a distinction, stating that the Convention's "strictures apply regardless of the existence of personal jurisdiction."[29]

The interpretation of the treaty by the decision below disregards the context in which it was written. Article 1 of the Convention permits a "judicial authority of a Contracting State" to "request the competent authority of another Contracting State, by means of a Letter of Request to obtain evidence, or to perform some other judicial act." App. C at 26a. This phrasing reflects the jurisprudence of the civil law countries which regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, its "judicial sovereignty" is considered violated. *See* Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters.* 18 Int'l & Comp. L.Q. 646, 647 (1969); Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 804, 806 (1969). A letter of request or "letter

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[28] *See* Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 24 Int'l Legal Materials 1668, 1679 (1985).

[29] Brief of United States as Amicus Curiae at 7 n.3, *quoted in full* at note 11, *supra.*

rogatory" is the procedure by which such participation or consent has traditionally been obtained.[30] To construe this procedure as having no applicability whenever a U.S. court asserts personal jurisdiction over a litigant who controls evidence located abroad is to exclude the most common case from the Convention's procedures. This would make violation of the judicial sovereignty of civil law countries the rule rather than the exception and relegate the Convention's procedures to disuse.

"[T]reaties are construed more liberally than private agreements, and to ascertain their meaning [the Court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-32 (1943); *see Factor v. Laubenheimer,* 290 U.S. 276, 294-95 (1933). The governments of France and Germany have indicated that they regard the procedures of the Hague Evidence Convention as mandatory and exclusive. In *Volkswagenwerk, A.G. v. Falzon,* the Solicitor General endorsed this interpretation of the treaty stating: "The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted."[31] Although the Solicitor General's brief in *Anschuetz* now takes the position that the Convention's procedures are not exclusive, the comity analysis which is commended presupposes the Convention's applicability to all discovery against foreign litigants. Otherwise, the Hague Evidence Convention would not remain "a valuable and workable mechanism for obtaining evidence abroad" or for reducing conflicts with "the laws or clearly articulated policies of a foreign government."[32]

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[30] See Carter, *Obtaining Foreign Discovery and Evidence for Use in Litigation in the United States: Existing Rules and Procedures,* 13 Int'l Law. 5, 10-11 (1979).

[31] Brief of United States as Amicus Curiae at 6.

[32] Brief of United States as Amicus Curiae at 13, *Anschuetz* and *Messerschmitt.*

B. Application of Principles of International Comity to the Present Case Requires Resort to the Procedures of the Hague Evidence Convention in the First Instance

Assuming that the procedures of the Hague Evidence Convention are non-exclusive, it does not follow that their use is entirely discretionary. Principles of comity require that resort be made to the Convention in the first instance,[33] at least when the issue is timely raised.[34] In particular, "American courts should refrain, whenever it is feasible, from ordering a person to engage in activities that would violate the laws of a foreign nation." *Compagnie Francaise D'Assurance v. Phillips Petroleum Co.*, 105 F.R.D. at 28.[35] Only if efforts to obtain evidence under the Convention's procedures prove unsuccessful, should use of domestic discovery rules be considered.

Comity is not "a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). Under the principle of comity, U.S. courts seek to accommodate important sovereign interests of other nations as expressed through their legislative, executive or judicial acts, where such accommodation can be achieved consistent with the rights of U.S. citizens and others under the protection of U.S. laws. *Id.* "Rulings based in this concept of international comity are dictated not by technical principles of jurisdiction of the parties to or subject matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual

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[33] *See* authorities cited in note 23, *supra*.

[34] *See, e.g.*, Cooper Industries, Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (defendant who failed to make timely motion for protective order waived right to claim protection under the Convention); Murphy v. Reifenhauser K.G. Maschinenfabrik, 101 F.R.D. 360, 361, 363 (D. Vt. 1984) (motion to compel granted where defendant failed to raise objections based on Convention until it had already answered two sets of interrogatories).

[35] The Solicitor General's comity analysis endorses this proposition. *See* Brief for United States as Amicus Curiae at 11, *Anschuetz* and *Messerschmitt*.

lawsuits." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d at 857, 176 Cal. Rptr. at 884. Precisely because this exercise is so flexible and far reaching, trial courts need clear guidelines or presumptions to apply in recurring cases.

A rule ordinarily requiring resort to the Convention in the first instance would insure that principles of comity are given adequate consideration. Lacking definite standards, a trial court is often swayed by the immediacy of the discovery demands made by the litigant standing before it, and there is a tendency to dismiss countervailing considerations as merely abstract or hypothetical questions of judicial sovereignty. *See, e.g., Murphy v. Reifenhauser*, 101 F.R.D. at 363. Moreover, because the question of whether to require adherence with the Convention's procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record. As a result, their findings are often conclusory and result-oriented.[36]

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[36] For example, several courts have reached the conclusion that requiring a litigant to employ the Convention's procedures would be "futile" on the basis of little or nothing more than a declaration under article 23, which states that a Party may reserve the right not to execute letters of request "issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries" (App. C at 26a). *See, e.g., Anschuetz*, 754 F.2d at 612; Wilson v. Lufthansa German Airlines, 489 N.Y.S.2d at 578. This provision, however, was not intended to preclude U.S. litigants from obtaining necessary evidence from abroad, but rather to prevent discovery of a "fishing expedition" nature. *See* Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1417, 1421 (1978). "Refusals to execute turn out to be very infrequent in practice." Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in* 17 Int'l Legal Materials 1425, 1431 (1978). Moreover, decisions such as *Anschuetz* and *Wilson* ignore the undertakings made by the Parties to the Convention to implement legitimate discovery requests. *See* Arts. 9, 10, 12, App. C at 29a-30a.

In the abstract, there is no conflict between the Hague Evidence Convention and the federal discovery rules. Both are means by which evidence can potentially be sought. The federal discovery rules, however, frequently run afoul of foreign statutes, policies or procedures, and it was in large measure to avoid the friction which such conflicts create that the Convention was adopted.[37] A general rule requiring use of Convention procedures in the first instance would, consistent with the framers' purpose, hold such conflicts to a minimum.

In this particular case, disclosure of the documents and information sought will violate the French Blocking Statute and subject petitioners to criminal penalties *unless* such disclosure is made through the procedures of the Convention. The decision below did not squarely address this consideration. It examined the French Blocking Statute as an objection to discovery only after it had decided that the Hague Evidence Convention does not apply. The court failed to consider the two together.

Throughout the entire appellate and trial court record, the only factors mentioned as weighing against the use of Convention procedures are the inconvenience and potential delay their use might engender. These factors, however, will be present in every case where the Convention is invoked. Thus the decision below, if left to stand unreviewed, will amount to judicial abrogation of the treaty. *See Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

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[37] *See* Report of United States Delegation to Eleventh Session of Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 820 (1969); Restatement of U.S. Foreign Relations Law (Revised, Tent. Draft No. 6 (Vol. 1)) 333 (1985) ("No aspect of the extention of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.").

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Appendix A

In re SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and Societe de Construction d'Avions de Tourism, Petitioners

No. 85-2306.

United States Court of Appeals,
Eighth Circuit.

Jan. 22, 1986.

Before McMILLIAN, ARNOLD, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism (Petitioners), corporate defendants in a civil action pending in the United States District Court for the Southern District of Iowa, have petitioned this court under Rule 21(a) of the Federal Rules of Appellate Procedure for a writ of mandamus directed at United States Magistrate Ronald E. Longstaff. We conclude that the petition should be denied.

I. PROCEDURAL BACKGROUND

The Petitioners, corporations owned by the Republic of France, design, manufacture, and market aircraft. Although the Petitioners design and manufacture their aircraft in France, they advertise and sell their aircraft in the United States. In 1980, an aircraft sold by the Petitioners was involved in an accident near New Virginia, Iowa. As a result of this accident, Dennis Jones, John George, and Rosa George (collectively "Plaintiffs") instituted actions for damages against the Petitioners. These actions were consolidated and are pending in the United States District Court for the Southern District of Iowa. Upon the parties' consent, the district court referred the actions to a magistrate in accordance with 28 U.S.C. § 636(c)(1).

The Plaintiffs served the Petitioners with a series of interrogatories, requests for admissions, and requests for production of documents under the Federal Rules of Civil Procedure. The Petitioners moved for a protective order contending that, to the

extent they possessed the documents or information requested by the Plaintiffs, the material was located in France. Thus, the Petitioners argued that the Plaintiffs must conduct their discovery in accordance with the procedures set forth in the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Convention" or "Convention"), to which the United States and France are signatories. The Petitioners also insisted that they should not be required to comply with the Plaintiffs' discovery requests, because to do so could subject the Petitioners to criminal liability under French Penal Code Law No. 80-538, Art. 1-*bis* ("French Blocking Statute"). The magistrate denied the Petitioners' motion for a protective order and ordered the Petitioners to comply with the Plantiffs' discovery requests. The Petitioners then filed this application for a writ of mandamus, and the magistrate's order has been stayed pending a decision from this court.

II. JURISDICTION

Mandamus review generally is available only in extraordinary situations, *Kerr v. United States*, 426 U.S. 394, 402, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *Central Microfilm Service Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1212 (8th Cir.1982), *cert. denied*, 459 U.S. 1204, 103 S.Ct. 1191, 75 L.Ed.2d 436 (1983), and is not ordinarily available to obtain immediate appellate review of an interlocutory discovery order. *Kerr*, 426 U.S. at 402-03, 96 S.Ct. at 2123-24; *In re Burlington Northern, Inc.*, 679 F.2d 762, 767-68 (8th Cir.1982); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir.1977), *modified on other grounds*, 572 F.2d 606, 611 (8th Cir.1978) (en banc). However, mandamus review may be appropriate to provide guidelines for the resolution of novel and important questions presented in the discovery order that are likely to recur. *Central Microfilm*, 688 F.2d at 1212, *citing Schlagenhauf v. Holder*, 379 U.S. 104, 111-12, 85 S.Ct. 234, 238-39, 13 L.Ed.2d 152 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 254-55, 258, 77 S.Ct. 309, 312-13, 314, 1 L.Ed.2d 290 (1957); *General Motors Corp. v. Lord*, 488 F.2d 1096, 1099 (8th Cir.1974). *See also* Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 Harv.L.Rev. 595 (1973).

This is the first time this court has been called upon to consider the novel and important questions concerning the interplay between the Federal Rules of Civil Procedure, the Hague Convention, and the French Blocking Statute. In addition, because the Plaintiffs are in the initial stages of discovery, and because the nature of the discovery requests at issue indicate that the answers generated from these requests may necessitate further discovery, we believe the questions presented here may well recur prior to any opportunity to review a final judgment. Thus, we conclude that this is an appropriate situation for mandamus review, and accordingly we will consider the petition on the merits.

III. THE HAGUE CONVENTION

Unlike the practice in the United States and other common law countries where pretrial discovery is considered a private matter primarily conducted by attorneys, France and other civil law countries regard discovery as a judicial function, to be accomplished by the courts. An attempt by an attorney from a common law country to gather evidence in a civil law country for a proceeding abroad has been considered an unlawful usurpation of the public judicial function, and an illegal intrusion on that nation's judicial sovereignty. *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 26 (S.D.N.Y.1984); Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters*, 18 Int'l & Comp.L.Q. 646, 647 (1967).

In response to this problem, the Hague Convention was designed to accommodate the civil law signatories' concerns for judicial sovereignty with the needs of litigants to collect evidence within those countries. To effectuate this purpose, the drafters of the Hague Convention provided procedures for the taking of evidence that would be "tolerable" in the country where the discovery takes place and "utilizable" in the forum country. *See Report of the United States Delegation to the Eleventh Session of Hague Conference on Private International Law*, 8 Int'l Legal Materials 785, 806 (1969); Amram, *The Proposed Convention on*

the Taking of Evidence Abroad, 55 A.B.A.J. 651, 652 (1969). Although foreign participation in drafting the Hague Convention stemmed from a perception that discovery efforts by American litigants were excessively broad and intrusive on the foreign countries' judicial sovereignty, United States participation was prompted by the frustration American lawyers had experienced in obtaining evidence in the foreign countries. Comment, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters: The Exclusive and Mandatory Procedures for Discovery Abroad,* 132 U.Pa.L.Rev.1960, 1965 (1984); Amram, 55 A.B.A.J. at 651. Of course, the civil law signatories' concern for judicial sovereignty would only be threatened when discovery procedures that are typically considered a judicial function are actually undertaken within the signatories' borders by a private party.

The Petitioners contend that because the Hague Convention is an international treaty specifically designed to accommodate the differences in the taking of evidence between common law and civil law countries, it provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory. Alternatively, the Petitioners argue that principles of international comity dictate that the Hague Convention be the method of first resort to gather information abroad, until it becomes apparent that such efforts will be futile.

Although a minority of courts have adopted the position advanced by the Petitioners, in our opinion the better rule, which has been adopted by the vast majority of courts, is that when the district court has jurisdiction over a foreign litigant the Hague Convention does not apply to the production of evidence in that litigant's possession, even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention. In particular, we agree with the analysis of the Fifth Circuit in *In re Anschuetz & Co., GmbH,* 754 F.2d 602 (5th Cir.1985), *petition for cert. filed,* 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No.85-98), that

> [T]he Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. * * * "[D]iscovery does not 'take place within [a state's] borders' merely because documents to be produced somewhere else are located there. Similarly, discovery should be considered as taking place here,. not in another country, when interrogatories are served here, even if the necessary information is located in the other country."
>
> In essence, matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention.

Anschuetz, 754 F.2d at 611 (quoting *Graco, Inc. v. Kremlin, Inc.,* 101 F.R.D. 503, 521 (N.D.Ill.1984)) (footnote omitted).

The discovery sought in this case neither intrudes on nor threatens French judicial sovereignty or custom. The magistrate's order does not require any foreign attorneys to appear in France to conduct discovery procedures that are typically considered a judicial function by France and other civil law countries. The order simply requires the Petitioners, who are parties subject to the jurisdiction of a United States court, to perform certain acts preparatory to the production of documents and information in the United States. These acts do not require any French judicial participation. Hence, we conclude that the Hague Convention does not apply to the discovery sought in this case "because the proceedings are in a United States court, involve only parties subject to that court's jurisdiction, and ultimately concern only matters that are to occur in the court's jurisdiction, not abroad." *In re Messerschmitt Bolkow Blohm GmbH,* 757 F.2d 729, 731 (5th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-99).

We disagree with the Petitioners' contention that such a conclusion will undermine the Hague Convention's stated purpose and render the entire Convention meaningless. The Hague Convention is intended not only to accommodate what civil law countries perceived as a threat to their judicial sovereignty, but also to aid common law litigants in their efforts to gather

information within the civil law countries and facilitate the exchange of information between nations. Furthermore, our ruling will not require any discovery to take place in France, and therefore the Convention's purpose of protecting French judicial sovereignty will not be undermined. On the contrary, we believe that a rule requiring domestic litigants to resort to the Hague Convention to compel discovery against a foreign litigant when the district court has jurisdiction over the parties would needlessly delay and frustrate the discovery process, undermining the Convention's purpose of aiding in the flow of information between nations.

In addition, the Hague Convention is justified by other considerations.

> Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the Convention's existence regardless of how the Convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without affront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multi-state convention, rather than a series of two-state agreements, confers the added benefit of standardized procedures.

Graco, 101 F.R.D. at 520 (footnotes omitted). Thus, the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign nonparties who are not subject to an American court's jurisdiction and compulsory powers.

The Petitioners also contend that principles of international comity require that the Plaintiffs first attempt discovery through the Hague Convention procedures, and only if their discovery efforts prove futile, the Plaintiffs may then rely on the discovery procedures in the Federal Rules of Civil Procedure. Although we recognize that several courts have required first resort to the Hague Convention, *see e.g., Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58 (E.D.Pa. 1983); *General Electric Co. v. North Star Int'l, Inc.*, No. 83-C-0838, slip op. (N.D.Ill. Feb. 21, 1984); *Schroeder v. Lufthansa German Airlines*, No. 83-C-1928, slip. op. (N.D.Ill. Sept. 15, 1983), we agree with the court in *Anschuetz* that "the greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." *Anschuetz*, 754 F.2d at 613. We believe that such a policy would defeat rather than promote international comity.

IV. THE FRENCH BLOCKING STATUTE

The Petitoners further insist that they should not be required to comply with the magistrate's discovery order, because to do so would subject them to potential criminal liability under the French Blocking Statute. The relevant provisions of the French Blocking Statute provide as follows:

> Article 1—*bis*—Subject to treaties or international agreements and laws and regulations in force, it is forbidden to all persons to ask, research or communicate, by writing, orally or under any other form, documents or information on economical, commercial, industrial, financial or technical matters leading to establishing proofs for use directly or indirectly in foreign judicial or administrative proceedings.
>
> * * * * * *
>
> Article 2—The persons affected by articles 1 and 1A must inform, without any delay, the Minister in charge whenever they are requested in any manner to provide such information.

* * * * * *

> Article 3—Without prejudice to heavier sanctions stipulated by the law, any infraction to the present Law Articles 1 and 1A provisions will be punished with two months to six months imprisonment and with a 10,000 to 120,000 french francs fine or any one of these two penalties only.

Law No. 80-538 of July 18, 1980 (translation attached as exhibit A to *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 273-74 (N.D. Ill. 1983)). The Petitioners contend that because the magistrate's discovery order does not require the Plaintiffs to obtain the requested evidence in accordance with a treaty or international agreement (the Hague Convention), the discovery order requires the Petitioners either to (1) comply with the discovery order and violate Article 1—*bis*, subjecting the Petitioners to the criminal penalties in Article 3, or (2) refuse to comply with the order and face possible sanctions in the district court. In our view, the issues the Petitioners raise must be addressed in two stages.

First, we must consider whether the magistrate was correct in ordering the Petitioners to comply with the Plaintiff's discovery requests, even though compliance may require the Petitioners to violate the French Blocking Statute. The magistrate properly recognized that "[t]he fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production." *United States v. First National Bank of Chicago*, 699 F.2d 341, 345 (7th Cir.1983). *See also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06, 78 S.Ct. 1087, 1091-92, 2 L.Ed.2d 1255 (1958); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992, 997 (10th Cir.1977) (citing *Societe Internationale*). Rather, the court must consider the competing interest at stake in each case and strike a careful balance between the competing interest and the extent to which those interest will be affected before determining whether or not to compel discovery. *United States v. Davis*, 767 F.2d 1025, 1034-35 (2d Cir.1985); *First National Bank of Chicago*, 699 F.2d at 345.

The magistrate employed a balancing test derived from section 40 of the Restatement (Second) of the Foreign Relations Law of the United States, which has been utilized by a number of other circuits. *See, e.g. Davis*, 767 F.2d at 1034-36 (2d Cir.); *In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817, 827-29 (11th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 778, 83 L.Ed.2d 774 (1985); *First National Bank of Chicago*, 699 F.2d at 345-46 (7th Cir.); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1288-91 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). Section 40 provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states;
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state.
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Restatement (Second) Foreign Relations Law of the United States § 40 (1965). After carefully reviewing the magistrate's analysis of the competing national interests, we conclude that the district court properly ordered the Petitioners to comply with the Plaintiffs' discovery requests.

The second stage of inquiry is whether the magistrate may impose sanctions against the Petitioners if the French Blocking Statute prevents them from complying with the discovery order. In *Societe Internationale* the Supreme Court held that although a court has the authority to order a foreign party to produce evidence when such production may subject the party to criminal sanctions in his own country, the foreign party's good faith in

attempting to comply with the order is relevant to what sanctions, if any, should be imposed in the event of noncompliance. 357 U.S. at 212, 78 S.Ct. at 1095. The Supreme Court found that, on the record presently before the Court, the Plaintiff had demonstrated its good faith in attempting to comply with the discovery requests and in attempting to secure a waiver of prosecution from the foreign government. Thus, the Court ruled that the sanction of dismissal of the Plaintiff's complaint with prejudice for noncompliance was not justified. *Id.* at 213, 78 S.Ct. at 1096. The court did, however, state that on remand the district court possessed wide discretion to proceed in whatever manner it deemed most effective and that the government could introduce additional evidence to challenge the Plaintiff's good faith. *Id.*

The record before this court does not indicate whether the Petitioners have notified the appropriate French Minister of the requested discovery in accordance with Article 2 of the French Blocking Statute, or whether the Petitioners have attempted to secure a waiver of prosecution from the French government. Because the Petitioners are corporations owned by the Republic of France, they stand in a most advantageous position to receive such a waiver. However, these issues will only be relevant should the Petitioners fail to comply with the magistrate's discovery order, and we need not presently address them.

Accordingly, we order that the petition for a writ of mandamus be denied. The case is remanded to the district court with instructions to lift its stay and proceed in accordance with this order.

It is so ordered.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 82-453-C

DENNIS F. JONES,
Plaintiff,

vs.

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE,
a French Corporation, et al.,
Defendants.

JOHN GEORGE, et al.,
Plaintiffs,

vs.

SEED & GRAIN CONSTRUCTION CO.,
an Iowa Corporation, et al.,
Defendants.

[Filed July 31, 1985]

ORDER

This matter is now before the Court upon the motion for protective order filed by defendants Societe Nationale Industrielle Aerospatiale and Societe De Construction d'Avions De Tourisme on June 12, 1985. Plaintiffs filed a resistance to this motion on June 19, 1985. The parties have submitted briefs and oral arguments were presented to the Court at a hearing on Tuesday, July 16, 1985.

I. BACKGROUND

Defendants are French corporations engaged in advertising and selling aircraft and component parts in the United States. After an accident occurred on August 19, 1980, involving an aircraft designed and manufactured by the defendants, this lawsuit was

instituted. The defendants have appeared and answered and are subject to this Court's jurisdiction.

The defendants responded to plaintiff's initial requests for production in August 1983 and in return, propounded interrogatories and made requests for production to plaintiff. Plaintiff has now served interrogatories upon the defendants and additional requests for production and admissions, which defendants resist. Defendants argue that plaintiff must comply with the Hague Evidence Convention in order to properly undertake discovery in this lawsuit. Plaintiff resists, claiming in personam jurisdiction over the defendant nullifies application of the Hague Convention and, further, that the courts in this country have interpreted the Convention as applying to taking evidence abroad, not within this country.

II. APPLICABLE LAW AND DISCUSSION

The issue brought before the Court is whether the Hague Evidence Convention supplants application of the discovery procedures of the Federal Rules of Civil Procedure to foreign nationals subject to in personam jurisdiction in a U.S. court.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides three methods of obtaining evidence abroad: by a letter rogatory, requesting authorities in a signatory state to obtain evidence or to perform some other judicial act to obtain evidence; by notice to appear before an American consulate officer or foreign officer; or by designation of a private commissioner. The Hague Convention, 23 U.S.T. 2555, TIAS No. 7444. Under the letter rogatory method, the letter of request is transmitted to the central authority of the foreign state and must specify:

> (a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
>
> (b) the names and addresses of the parties to the proceedings and their representatives, if any;
>
> (c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

> (d) the evidence to be obtained or other judicial act to be performed.

Other information as needed must also be specified, according to Article 3. 23 U.S.T. 2558-59. Letters of Request must be in the language of the authority requested to execute it or be accompanied by a translation into that language. Art. 4. France has made an authorization pursuant to Art. 33, providing that it will execute only letters in French or accompanied by a translation in French. 28 U.S.C.A. §§ 1635-1960, 1984 pocket part, p. 90.

While the issue of whether the Hague Convention must override the Federal Rules of Civil Procedure is not widely addressed in case law, there appears to be a split among the jurisdictions which have addressed the issue.

The most recent case resolving the issue in favor of permitting discovery is *In re Anschuetz & Co., GmbH*, 754 F.2d 602 (5th Cir. 1985). This case involved product liability claims arising out of the collision of two ferry boats within the state of Louisiana. Anschuetz, a German corporation, was third-partied in as designer of a steering device which allegedly failed, contributing to the cause of the accident. Third-party plaintiff Gijonesa served interrogatories, requests for production and notices of depositions, to which Anschuetz responded with a motion for protective order. Upon petition for writ of mandamus, the Fifth Circuit invited amicus curiae briefs from the Federal Republic of Germany and from the U.S. Department of Justice as the question was being considered for the first time by a circuit court. In a carefully researched opinion, the court reached the conclusion that the Hague Convention would be used with

> the involuntary deposition of a party conducted in a foreign country, and with the production of documents or other evidence gathered from persons or entities in the foreign country who are not subject to the court's in personam jurisdiction. The Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal rules. So long as discovery is sought for the identity and qualifications of witnesses there is no basis to suggest

that supplying this information amounts to obtaining evidence in Germany.

Id. at 615.

Some of the language explaining the court's rationale for this conclusion should be noted:

> Anschuetz' interpretation of the treaty, taken to its logical conclusion, would give foreign litigants an extraordinary advantage in United States courts. Insofar as Anschuetz seeks discovery it would be permitted the full range of free discovery procedures provided by the Federal Rules. But when a United States adversary sought discovery, this discovery would be limited to the cumbersome procedures and narrow range authorized by the Convention. Further, we believe that requiring domestic litigants to resort to the Hague Convention to compel discovery against their foreign adversaries encourages the concealment of information—a result directly antithetical to the express goals of the Federal Rules and the Hague Convention which aim to encourage the flow of information among adversaries.

Id. at 606. The court rejected the argument that the Hague convention was exclusive:

> "the fact that documents are situated in a foreign country does not bar their discovery." (quoting *Cooper Industries v. British Aerospace,* 102 F.R.D. 918 (S.D.N.Y. 1984) and citing *Marc Rich & Co. v. U.S.,* 707 F.2d 663, 667 (2d Cir.) (grand jury investigation), *cert. denied,* 103 S. Ct. 3555 (1983).
>
> * * *
>
> The production demanded here does not infringe on British sovereignty as it calls merely for documents, not a personal appearance. Defendant cannot be allowed to shield crucial documents from discovery by parties with whom it has dealt in the United States merely by storing them with its affiliate abroad. Nor can it shield documents by destroying its own copies and relying on customary access to copies maintained by its affiliate

> abroad. If one defendant could so easily evade discovery, every United States company would have a foreign affiliate for storing sensitive documents.
>
> (quoting *Cooper,* 102 F.R.D. 920).

Id. at 607. *Cooper,* it should be noted, dealt with the discovery of documents in the possession of the defendant's British affiliate; by contrast, *Jones v. Societe* (and *Anschuetz*) deal with documents in the possession of a totally foreign corporation. The Fifth Circuit further backed up its position with language from a federal district court sitting in Illinois deciding similar discovery issues in a patent infringement case. The court in *Graco v. Kremlin, Inc.,* 101 F.R.D. 503 (N.D. Ill. 1984), in permitting the discovery from a French corporation without requiring compliance with the Hague Convention, explained the reasons for the Hague Convention:

> It cannot be denied that foreign displeasure played some part in shaping the convention, but it is a mistake, the court believes, to view the convention as an international agreement to protect foreign nationals from American discovery when they are parties properly before American courts. Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the convention's existence regardless of how the convention is deemed to apply with respect to parties before the court. First, a non-party witness may be willing to be deposed at home, but may be unwilling to travel to the country in which the litigation is proceeding. Since some countries would consider the taking of evidence within their borders a usurpation of judicial prerogative, an international agreement setting up a framework for seeking and granting permission has great value, allowing evidence to be taken without affront to local authorities. Second, an unwilling non-party witness simply cannot be reached, if outside the court's jurisdiction, unless authorities in the witness' state use their authority to compel the giving of evidence. An international agreement provides a framework for the invocation of a foreign authority's compulsory powers, making accessible evidence which otherwise would not have been accessible. A multi-state

> convention, rather than a series of two state agreements, confers the added benefit of standardized procedures.

Id. at 519-20 (quoted in *Anschuetz* at 611). Civil law states take the position that gathering evidence *within* the state is exclusively within the province of that state's courts; any encroachment on this function may be regarded as a violation of the state's "judicial sovereignty." *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App. 3d 840, 853, 176 Cal. Rptr. 874, 881 (1982).

The *Anschuetz* court found "particularly apt the [Graco] court's observation that the Convention does not require deference to a foreign country's judicial sovereignty over documents, people, and information—if this is really how civil law judicial sovereignty is understood—when such documents are to be produced in the United States. . . . " *Anschuetz*, 754 F.2d at 611. The Fifth Circuit determined that "matters preparatory to compliance with discovery orders in the United States, even where the preparatory acts occur in foreign nations, do not constitute discovery in the foreign nation as addressed by the Hague Convention." *Id.* Another effect of requiring that interrogatories and document requests be directed through foreign authorities under the Convention, the court noted, was the drastic and costly change in handling litigation which would occur due to the procedures required under the Convention. *Id.* at 612.

The Fifth Circuit did note that judicial power over international discovery should be "tempered by a healthy respect for the principles of comity", *id.* at 614 but found

> [T]he Hague Evidence Convention contains no express provision for exclusivity. In addition, extraterritorial discovery has been a standard practice of American courts for some time, and there is no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit the practice. In fact, the Senate Report emphasized that the Convention was intended to improve, not thwart, the means of securing evidence abroad.

As noted by defendants, the *Anschuetz* court did not order discovery or issue mandamus, but did direct the lower court to consider fashioning its discovery orders in light of the principles

discussed by the Fifth Circuit. *Id.* The Court of Appeals did state that the trial court could order documents to be produced and witnesses to be examined in the United States if the defendant was not "voluntarily forthcoming in Germany" and that the "full range of sanctions available in the federal rules" could be applied to parties over whom the court had in personam jurisdiction. *Id.*

Other courts which have addressed the issue have allowed discovery and discussed the arguments now being advanced by the defendant French corporations. Regarding defendant Lufthansa's argument that the Hague Convention is the exclusive means for compelling it to produce documents and secure the deposition of two of its officers:

> Nowhere in these [discovery] Rules is there the slightest suggestion that a party properly before the Court may not avail itself of these discovery rights against another party within the jurisdiction of the Court merely because the documents sought or the persons to be deposed are not located in the United States. Indeed, the Rules clearly contemplate their applicability abroad if the United States Court has jurisdiction. *See, e.g.*, Rule 28(b), Fed. R. Civ. P.

Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 42, 48 (D.C.D.C. 1984). In determining that the issue was not a matter of supremacy over state law, but rather which federal law—the Hague Convention or the Federal Rules of Civil Procedure—should be applied, the district court for the Southern District of New York reasoned:

> A finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary. Society International v. Rogers, 357 U.S. 197, 204-06 (1958); United States v. First National City Bank, 396 F.2d 897, 900-09 (2d Cir. 1968); United States v. Vetco, 644 F.2d 1324, 1329 (9th Cir., cert. denied, 454 U.S. 1098 (1981). Plaintiffs have urged this Court to defer to the French [blocking] statute and to decline to order the requested discovery.

In fact, it is suggested that we are required to do so, because Article 11 and 21 of the Hague Convention on the Taking of Evidence Abroad would permit a party confronted with a statute such as Article 1 to refuse to give evidence. Because the United States is a signatory to the Convention, the argument continues, this Court is bound by its provision and must also permit plaintiffs to refuse to produce the documents. In essence, plaintiffs argue that the Articles of the Hague Convention withdraw from this court the right to employ the discovery devices provided in the Federal Rules of Civil Procedure because they conflict with the provisions of the French Law No. 80-538.

The Hague Convention, signed by both France and the United States, is an international treaty and as such is entitled to be recognized as part of the supreme law of the land. (citation omitted.) The Federal Rules of Civil Procedure, duly enacted by Congress, are also part of the supreme law of the land. Absent a direct conflict, our duty is to enforce them both. Nothing in the legislative history of the Hague Convention nor in the Congressional proceedings at the time of its adoption, suggests that Congress intended to replace, restrict, modify or repeal the Federal Rules. Indeed, Philip Amram, a member of the United States delegation to the 1968 session of the Convention, described its provisions as a 'climax [of] more than a generation of effort . . . by those interested in modernizing and improving international judicial assistance' and stated it would effect 'no major changes in U.S. procedure [nor require any] changes in U.S. legislation or rules.' (citation omitted.)

Treaties should be construed so as to effect their purposes (citation omitted), and to be as consistent, insofar as possible, with coexisting statutes, (citation omitted). The goal of the Hague Convention was to facilitate and increase the exchange of information between nations. It would not serve this goal to transform its provisions into a means to frustrate the discovery process. We conclude, therefore, that this Court is not required to defer to the French statute by virtue of the Hague Convention.

Compagnie Francaise d'Assurance v. Phillips Petroleum Co., 81 Civ. 4463-CLB, slip op. at 10-12 (S.D.N.Y. Jan. 25, 1983) (quoted in *Anschuetz*, 754 F.2d at 613 n.28 and *Laker*, 103 F.R.D. at 49).[1]

On the other side of the judicial coin are the opinions of a few courts which have required compliance with the Hague Convention. In *Volkswagenwerk A. G. v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982), the plaintiff in the originating case sought inspection of defendant's German plant and production of documents and other discovery in Wolfsburg, West Germany. The California Court of Appeals decided on the basis of international comity and judicial restraint that plaintiffs had to comply with the Hague Convention in obtaining this discovery

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[1] Other cases of note on this issue, but not addressing the Hague Convention argument specifically: *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("Once personal jurisdiction over the person and control over the documents by the person are present, a United States court has power to order production of the documents. The existence of a conflicting foreign law which prohibits the disclosure of the requested documents does not prevent the exercise of this power."); *La Chemise Lacoste v. General Mills, Inc.*, 53 F.R.D. 596, 604 (D. Del. 1971) ("There is no affidavit in the record indicating the bulk or cost of shipping the documents here and really no factual basis on which the Court may sustain [the objection to production of documents located in France]. It would appear offhand that shipping the documents to the United States would entail less expense than attorneys making the trip to France for such discovery."); *see also Murphy v. Reifenhauser KG Maschinenfabrik*, 101 F.R.D. 360, 363 ("[C]omity [in the legal sense . . . the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation] does not require plaintiff [administrator of estate of son who was killed by a machine made by defendant] to proceed first under the Convention in this case, particularly at this relatively late stage of discovery, and particularly where it appears that a request for production of documents under the Convention would be futile." . . . We need not attribute defendant's delay in raising this issue to bad faith in order to find that this case should not be further prolonged for many months in order to accommodate a somewhat hypothetical conflict between ordinary American discovery and German sovereignty.").

which was within the German courts' "judicial sovereignty." *Id.* at 853, 176 Cal. Rptr. at 881. Similarly, in *Pierburg GmbH & Co. KG v. Superior Court*, 137 Cal. App. 3d 238, 186 Cal. Rptr. 876 (1982), the court vacated an order in a products liability action which required the defendant West German corporation to answer written interrogatories without compliance with the Hague Convention. This determination was also based on the "supremacy" of the Hague Convention as federal over state law (California Rules of Civil Procedure) and "in exercise of judicial restraint based on international comity." *Id.* at 245, 186 Cal. Rptr. at 880. In denying a motion to compel answers to interrogatories and to produce documents, the District Court for the Eastern District of Pennsylvania required the plaintiff to comply with the Hague Convention. *Philadelphia Gear Corp. v. American Pfauter Corp. & BHS-Dr. Ing. Hofler GmbH*, 100 F.R.D. 58 (E.D. Pa. 1983). In coming to this decision, the court relied on the California cases, stating:

> To allow the forum court to supplement the convention with its own practices would not promote uniformity in the gathering of evidence nor generate a spirit of cooperation among signatories to the treaty. . . . Obviously, to permit one sovereign to foist its legal procedures upon another whose internal rules are dissimilar would run afoul of the interests of sound international relations and comity.

Id. at 60. In a footnote, the court found no merit in plaintiff's argument that because defendant had served discovery requests pursuant to the Federal Rules of Civil Procedure, it should be estopped from asserting the applicability of the Hague Convention. "The Convention is at issue only when a litigant from a signatory country seeks evidence in another signatory country other than where the case is pending. Hofler's request did not seek to take any evidence abroad. It was directed to a party residing in the country where the litigation was initiated." *Id.* at 61 n.5.

These cases were distinguished in *Graco v. Kremlin, Inc.*, 101 F.R.D. 503, 517-24 (N.D. Ill. 1984). The *Graco* court noted that in *Volkswagenwerk*, discovery orders involving formal discovery proceedings to be conducted *in* West Germany were involved,

which would call for application of the Hague Convention. *Pierburg*, which involved only written interrogatories to a West German defendant, was, in the opinion of the *Graco* court, not well reasoned and distinguishable from *Volkswagenwerk*, upon which the *Pierburg* court relied. *Graco*, 101 F.R.D. at 518-19. *Philadelphia Gear*, the *Graco* court noted,

> cites the Convention's purpose of promoting mutual judicial cooperation, apparently associating this notion also with principles of comity. . . . International judicial cooperation is, however, or at least should be, an extraordinary measure, employed to protect the sovereign interests of another country when those interests truly are implicated. Trying (or pretrying) a case in two different countries' courts is not a desirable way of handling routine litigation. Involving two judicial systems in a single lawsuit is as likely to disrupt international relations as it is to promote them, especially when the two systems are brought together for discovery purposes.

Id. at 523. Examining Article 23 of the Convention, which permits a state to refuse to execute a letter rogatory issued to obtain pretrial discovery of documents, the *Graco* court concluded that such a broad interpretation as the *Philadelphia Gear* court gave would give foreign courts power over the conduct of litigation in American courts:

> Either American courts would surrender jurisdiction by treating the decisions of foreign authorities as final and unreviewable, or they would invite endless motions and real international friction by second-guessing those decisions. The court cannot understand why a requirement making such judicial cooperation routine should be inferred from a treaty containing very little language to justify its inference, and the court also does not believe that principles of international comity demand (or are served by) such a requirement.

Id. at 524. The court did not require Graco to proceed only under the Convention, emphasizing that it was not ordering that any proceeding be conducted within France.

Defendants argue that they are caught in a legal "Catch-22" in that, by French statute, they are subject to penalty if they provide commercial information to foreign public entities without complying with the Hague Convention. French Penal Code, Law. No. 80-538, Articles 1 and 1-*bis*. At the same time defendants are subject to sanctions by American courts if they fail to cooperate in discovery.

The French law in question was originally "inspired to impede enforcement of United States antitrust laws," but was phrased without a requirement that antitrust law be involved. *See* Toms, *The French Response to Extraterritorial Application of United States Antitrust Laws*, 15 Int'l Law. 585, 586, (1981). The provision of the law in question here is Article 1-*bis* which provides:

> Subject to any treaties or international agreements and the laws and regulations in force, it is prohibited for any person to request, to investigate or to communicate in writing, orally or by any other means, documents or information relating to economic, commercial, industrial, financial or technical matters leading to the establishment of proof with a view to foreign administrative or judicial proceedings or as a part of such proceedings.

Toms, *supra* at 611. Violation of this section is punishable by a prison term of two to six months and/or a fine of 10,000 to 120,000 Francs. French Penal Code, Law No. 80-538, Article 3. Article 1-*bis*' application is limited to discovery within French territory, Toms, *supra* at 595, and a party who is affected by the law may seek a waiver of its provisions from the appropriate French minister, to whom they are to report such requests. French Penal Code, Law No. 80-538, Article 2; *see Soletanche and Rodio v. Brown and Lambrecht*, 99 F.R.D. 269, 271 (N.D. Ill. 1983) (holding compliance with court's discovery order would not impose "too great a burden" on plaintiffs as they were only being required to contact the appropriate minister, as required by law, and request a waiver). It appears that Articles 1 and 1-*bis* have not been strictly enforced in France, *see* Toms, *supra* at 599 and 605. The Toms article also notes that "the legislative history [of the Law] shows only that the Law was adopted to protect

French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction. Nowhere is there an indication that the Law was to impede litigation preparations by French companies, either for their own defense or to institute lawsuits abroad to protect their interests, and arguably such applications were unintended." Toms, *supra* at 598.

The "Catch-22" situation which defendants face has been addressed by the federal district court sitting in the Northern District of Illinois on at least two occasions. In *Soletanche and Rodio v. Brown and Lambrecht*, the court ordered plaintiff French corporations to answer interrogatories and produce documents in spite of Law No. 80-538 and potential criminal liability. 99 F.R.D. 269 (N.D. Ill. 1983).

> As the Seventh Circuit recently stated, "the fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production." (Citations omitted). In doing so, however, the court is required to engage in a sensitive balancing of the competing interests at stake in compelling such production. . . .
>
> . . . [T]he factors to consider in balancing competing interests . . . are: vital national interests of each of the states; the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; the extent to which the required conduct is to take place in the territory of the other state; the nationality of the person; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Id. at 271. *See also Graco v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984) for a discussion of the problems created by Article 1-*bis*.

The vital national interest in this case is protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. France's interest is protection of their citizens from intrusive foreign discovery procedures; however, it does not appear that France has strictly enforced the

law. Defendants face no extraordinary hardship at this point as it is not clear that the law will be strictly enforced against them. The required conduct does not have to take place in France as the interrogatories can be answered in the United States and the documents requested produced there. The defendants are French national corporations. The final factor does not come into consideration here as the Court is not at this stage concerned with enforcement of discovery orders.

III. CONCLUSION

Based on the foregoing discussion, this Court denies the defendants' motion for protective order insofar as it relates to answering interrogatories, producing documents and making admissions. This decision is based on the Court's concern with the impediment to discovery which the Hague Evidence Convention places on litigation in American courts and the potential interference with such proceedings which forcing compliance with foreign court procedures would cause.

> If interpreted as preempting routine interrogatories and document requests, the Convention really would be much more than an agreement on taking evidence abroad, which is what it purports to be. Instead, the Convention would amount to a major regulation of the overall conduct of litigation between nationals of different signatory states, raising a significant possibility of very serious interference with the jurisdiction of the court in which the litigation is begun. The solicitude for the judicial sovereignty of civil law countries shown in *Schroeder, Philadelphia Gear*, and *Pierburg* apparently is unmatched by any recognition that they are suggesting a startling limitation on the sovereign powers of this country, as expressed through its courts. Treating the Convention procedures as exclusive would make foreign authorities the final arbiters of what evidence may be taken from their nationals, even when those nationals are parties properly within the jurisdiction of an American court.

Graco, 101 F.R.D. at 521-22. This Court is not dealing with a conflict between state rules of civil procedure and a treaty, but

with a conflict between two essentially equal federal laws. To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases, in protecting United States citizens from harmful products and in compensating them for injuries arising from use of such products. As to defendants' argument of illegality, this Court determines that the United States' interests are stronger than potential French interests, given no strong evidence that Law No. 80-538 is strictly enforced. The conduct to be ordered does not have to take place in France and the procedures to be ordered are not greatly intrusive or abusive.

For these reasons, the Court orders discovery as follows:

1. Defendant shall answer the interrogatories propounded by plaintiffs and respond to plaintiffs' request for admissions and for production of documents on or before October 1, 1985.

2. If discovery depositions are to be undertaken, the Court will require compliance with the Hague Evidence Convention if such depositions are to be conducted in France, based on the Court's understanding of the current law.

IT IS SO ORDERED.

Dated this 31st day of July, 1985.

/s/ R. E. LONGSTAFF
R. E. Longstaff
U.S. Magistrate

Appendix C

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER 1—LETTERS OF REQUEST

ARTICLE 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

ARTICLE 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority or another Contracting State and to transmit them to the authority competent to execute them. Each State shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

ARTICLE 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalization or other like formality may be required.

ARTICLE 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

ARTICLE 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

ARTICLE 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent

forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

ARTICLE 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

ARTICLE 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

ARTICLE 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

ARTICLE 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

ARTICLE 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

ARTICLE 12

The execution of a Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

ARTICLE 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

ARTICLE 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

ARTICLE 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

ARTICLE 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the

area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

ARTICLE 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permissions.

ARTICLE 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

ARTICLE 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

ARTICLE 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

ARTICLE 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

ARTICLE 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

ARTICLE 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

ARTICLE 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall

have exclusive competence to execute Letters of Request pursuant to this Convention.

ARTICLE 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

ARTICLE 27

The provisions of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

ARTICLE 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

ARTICLE 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905[1] and the 1st of March 1954,[2] this Convention shall replace Articles 8-16 of the earlier Conventions.

ARTICLE 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

ARTICLE 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

ARTICLE 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions contain-

[1] 99 *British Foreign and State Papers* 990.

[2] 286 UNTS 265.

ing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

ARTICLE 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

ARTICLE 34

A State may at any time withdraw or modify a declaration.

ARTICLE 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

ARTICLE 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

ARTICLE 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of the Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present

[1] TS 993; 59 Stat. 1055.

Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such delaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

ARTICLE 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.[1]

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

[1] Extended to Guam, Puerto Rico, and the Virgin Islands pursuant to notification sent by the American Embassy at The Hague on Feb. 6, 1913.

ARTICLE 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

ARTICLE 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channels, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Appendix D

FEDERAL RULES OF CIVIL PROCEDURE

Rule 33. Interrogatories to Parties

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers and objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and

upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980.)

RULE 36. Requests for Admission

(1) Requests for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been

or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final

disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970.)

Appendix E

Translated from the French

July 17, 1980 OFFICIAL JOURNAL OF THE FRENCH REPUBLIC 1979

LAWS

ACT 80-538 of July 16, 1980 relative to disclosure of economic, commercial or technical documents and data to natural persons or legal entities.

The National Assembly and the Senate have adopted,

The President of the Republic promulgates the following Act:

Art. 1. The title of Act 68-678 of July 26, 1968 relative to disclosure of documents and information to foreign authorities in the field of maritime commerce is amended to read:

"Act relative to disclosure of economic, commercial, industrial, financial or technical documents and data to natural persons or legal entities".

Art. 2. I—Article 1 of Act 68-678 of July 26, 1968 aforesaid is worded as follows:

"Art. 1. Subject to treaties or international agreements, it is prohibited for any natural person of French nationality or habitually residing in French territory and for any executive, representative, employee or agent of a legal entity having its registered office or an establishment therein to disclose in writing, orally or otherwise, in any place, to foreign public authorities, economic, commercial, industrial, financial or technical documents or data disclosure of which is liable to infringe the sovereignty, security, essential economic interests of France or public policy, specified by the administrative authorities if need be".

II—Article 1A reading as follows is inserted after article 1 of Act 68-678 of July 26, 1968 aforesaid:

"Art. 1A. Subject to treaties or international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic,

commercial, industrial, financial or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith".

Art. 3. Article 2 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

"Art. 2. The parties mentioned in articles 1 and 1A shall forthwith inform the competent minister if they receive any request concerning such disclosures".

Art. 4. Article 3 of Act 68-678 of July 26, 1968 aforesaid is amended to read:

"Art. 3. Without prejudice to heavier penalties prescribed by law, any breach of articles 1 and 1A of this Act shall be punished by imprisonment for two to six months and a fine of 10,000 to 120,000 F or either".

This Act shall be executed as a State law.

Paris, July 26, 1980.

Signed by Valéry Giscard D'Estaing, President of the Republic, Raymond Barre, Prime Minister, Alain Peyrefitte, Minister of Justice, Jean François Poncet, Foreign Minister, René Monory, Minister of the Economy, André Giraud, Minister of Industry, Joël Le Theule, Minister of Transportation, Jean-François Deniau, Minister of Foreign Trade and Maurice Charretier, Minister of Commerce and Crafts.

[Seal]

17 Juillet 1980 JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE

LOIS

LOI n° 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales ètrangères (1).

L'Assemblée nationale et la Sénat ont adopté,

Le Président de la République promulgue la loî dont la teneur suit:

Art. 1er— Le titre de la loi n° 68-678 du 26 julliet 1968 relative à la communication de documents et renseignements à des autorités étrangères dans le domaine du commerce maritime est modifié ainsi qu'il suit:

"Loi relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères."

Art. 2. — I. — L'article 1er de la loi n° 68-678 du 26 juillet 1968 susvisée est ainsi rédigé:

"*Art.* 1er— Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire française et à tout dirigeant, représentant, agent ou préposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature àporter atteinte à la souveraineté, à la sécurité, aux intérets économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que besoin."

II. — Il est inséré, après l'article 1er de la loi n° 68-678 du 16 juillet 1968 susvisée, un article 1er *bis* ainsi rédigé:

"*Art.* 1er bis. — Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute

personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci."

Art. 3. — L'article 2 de la loi n° 68-678 du 26 juillet 1968 suvisée est ainsi modifié:

"*Art.* 2. — Les personnes visées aux articles 1er et 1er *bis* sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications."

Art. 4. — L'article 3 de la loi n° 68-678 du 26 juillet 1968 précitée est ainsi modifié:

"*Art.* 3. — Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1er et 1er *bis* de la présente loi sera punie d'un emprisonnement de deux mois à six mois et d'une amende de 10 000 F à 120 000 F ou de l'une de ces deux peines seulement."

La présente loi sera exécutée comme loi de l'Etat.

Fait à Paris, le 16 juillet 1980.

VALÉRY GISCARD D'ESTAING.

Par le Président de la République:

Le Premier ministre,
RAYMOND BARRE.

Le garde des sceaux, ministre de la justice,
ALAIN PEYREFITTE.

Le ministre des affaires étrangères,
JEAN FRANÇOIS-PONCET.

Le ministre de l'économie,
RENÉ MONORY.

Le ministre de l'industrie,
ANDRÉ GIRAUD.

Le ministre des transports,
JOËL LE THEULE.

Le ministre du commerce extérieur,
JEAN FRANÇOIS DENIAU.

Le ministre du commerce et de l'artisanat,
MAURICE CHARRETIER.

APPENDIX F

Ambassade de France aux Etats-Unis
Washington, D.C.

Novembre 1985

L'Ambassade de France présente ses compliments au Département d'Etat et, se référant à la note de l'Ambassade du 4 août 1985, a, sur instruction de son Gouvernement, l'honneur de lui faire savoir ce qui suit.

Dans sa note précitée, l'Ambassade avait appelé l'attention des autorités américaines sur le vif désir des autorités françaises de voir la Cour Suprême des Etats-Unis accepter d'examiner le recours de deux sociétés allemandes, Anschuetz et Cie et Messerschmitt Bolkow Blohm, en raison des implications directes que ces deux affaires ont sur l'interprétation et l'application de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale.

Les autorités françaises souhaitent souligner à nouveau l'importance qui s'attache au respect de la convention du 18 Mars 1970, qui constitue, dans les relations entre les Etats parties, le seul moyen juridique pour obtenir des preuves en matière civile ou commerciale pour les nécessités d'une procédure judiciaire.

Elles rappellent tout d'abord que l'entraide judiciaire internationale ne peut s'exercer que dans le respect de la souveraineté de chaque Etat et plus particulièrement du principe de la territorialité des lois qu'en conséquence le fait pour une autorité judiciaire d'un Etat d'exiger la communication de documents ou de renseignements se trouvant placés sous la juridiction d'un Etat étranger, sans l'autorisation de ce dernier et sans respecter les procedures en vigueur dans cet Etat, constitue, au regard du droit international, une atteinte à la souveraineté dudit Etat.

C'est pour éviter cet écueil et pour permettre l'établissement d'une nécessaire coopération en matière judiciaire entre Etats souverains qu'a été conclue la Convention de la Haye du 18 mars 1970. Un examen du texte de cette convention montre clairement que les demandes d'obtention de preuves civiles ou commerciales par une autorité judiciaire d'un Etat partie à la convention sur le territoire d'un autre Etat également partie ne sont recevables par la partie requise que si ces demandes sont formulées dans le respect des conditions strictes établies par la convention, ce qui constitue une reconnaissance de la souveraineté judiciaire de l'Etat requis.

L'article 27 de la Convention confirme encore cette conception :

Cet article stipule que les dispositions de la présente convention ne font pas obstacle à ce qu'un Etat contractant :

c) permette, aux termes de sa loi ou de sa coutume interne, des méthodes d'obtention de preuves autres que celles prévues par la présente convention.

Cette formulation négative prouve que la recherche de preuves civiles ou commerciales par des moyens non prévus par la convention est effectivement subordonnée au consentement de l'Etat requis. Elle signifie, en défini-

tive, que tout ca qui n'est pas expressément prévu par la convention ou par la législation de l'Etat requis est interdit.

Il apparait ainsi que la Convention du 18 mars 1970, est, à défaut d'une autorisation explicite de l'Etat requis, le passage obligé pour obtenir entre Etats parties des preuves en matière civile ou commerciale en vue de procédures judiciaires.

Les autorités françaises souhaitent en outre souligner que le Parlement français a voté le 16 juillet 1980 une loi qui interdit la recherche de documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédure judiciaires ou administratives étrangères ou dans le cadre de celles-ci. Toutefois cette loi réserve l'application des procédures prévues par les accords internationaux auxquels la France est partie et valorise ainsi ces accords, tout particulièrement la convention de La Haye.

C'est pour toutes ces raisons que les autorités françaises considèrent qu'il est dans l'intérét commun de veiller au respect des dispositions de la Convention de La Haye. Elles réitèrent en conséquence auprès du Département d'Etat leur souhait de voir la Cour Supréme des Etats-Unis accepter les deux recours sus-mentionnés.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat les assurances de sa très haute considération.

DEPARTMENT OF STATE
DIVISION OF LANGUAGE SERVICES

(Translation)

LS NO. 118204
RHC/MM
French

Embassy of France in the United States

Washington, November 23, 1985

The Embassy of France presents its compliments to the Department of State and, in reference to the Embassy's note of August 4, 1985, on instructions of its Government, has the honor to inform it of the following:

In the aforementioned note, the Embassy called to the attention of the United States authorities the strong wish of the French authorities that the United States Supreme Court agree to examine the appeal of two German firms, Anschuetz and Co. and Messerschmitt Bolkow Blohm, because of the direct implications that these two cases have on the interpretation and application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil or commercial matters.

The French authorities wish to reiterate the importance they attach to compliance with the Convention of March 18, 1970, which constitutes, in relations between the States parties, the only legal means of obtaining evidence in civil or commercial matters for the requirements of a judicial procedure.

They recall first that international judicial assistance can take place only with respect for the sovereignty of each State and particularly for the principle of the territoriality of laws, and consequently for a judicial authority of one State to demand the production of documents or information that are under the jurisdiction of a foreign State, without its authorization and without respecting the procedures in force in that State, would constitute under international law an infringement of the sovereignty of that State.

It was in order to avoid this difficulty and make it possible to establish the necessary cooperation in judicial matters between sovereign States that The Hague Convention of March 18, 1970, was concluded. An examination of the text of this Convention clearly shows that requests for the production of civil or commercial evidence by a judicial authority of a State party to the Convention in the territory of another State party are not admissible by the requested Party unless such requests are formulated in conformity with the strict conditions established by the Convention, which constitutes recognition of the judicial sovereignty of the requested State.

Article 27 of the Convention reconfirms this concept:

This article stipulates that the provisions of the present Convention shall not prevent a Contracting State from:

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

This negative wording proves that the search for civil or commercial evidence by means not covered by the Convention is indeed dependent upon the consent of the requested State. In the final analysis, it means that whatever is not expressly covered by the Convention or by the laws of the requested State is prohibited.

Thus it appears that the Convention of March 18, 1970, in the absence of explicit authorization by the requested State, is the obligatory channel for obtaining evidence between States parties in civil or commercial matters for purposes of legal procedures.

The French authorities also wish to emphasize that on July 16, 1980, the French Parliament enacted a law that prohibits the search for documents or information of an economic, commercial, industrial, financial, or technical nature for the purpose of compiling evidence for foreign judicial or administrative procedures or in the context of such procedures. However, this law retains the application of the procedures provided for in the international agreements to which France is party and thus confirms such agreements, particularly The Hague Convention.

For all these reasons the French authorities consider it in the common interest to ensure that the provisions of The Hague Convention are respected. Consequently they reiterate to the Department of State their wish to have the United States Supreme Court hear the two aforementioned appeals.

[Complimentary close]

[Initialed]